Chapter 13: OPERATIONS
(By Division of State Lands)

A. RECORDERS' OFFICES

By way of contrast to the deficits shown to exist in the Registrars' offices, operations in the Recorders' offices indicate a healthy condition generally. A number of counties could not supply the information desired, but of those who did so practically all were able to show an excess of fees received over all costs involved. This excess increased with the volume of business. In some cases it has resulted from the adoption of the photographic system. Statistics for several counties follow.

OPERATIONS IN RECORDERS' OFFICES IN SELECTED COUNTIES

County	Year	Fees	Total Costs	Number of Documents Recorded	Number of Employees in 1950
Alameda	1945	$ 161,501.70	$ 165,548.73	87,563	
	1946	188,538.45	183,310.05	115,272	
	1947	247,171.58	241,837.99	111,058	
	1948	297,039.55	223,175.30	98,455	
	1949	267,154.17	163,164.79	93,715	36
Los Angeles	1945	916,747.99	686,058.25	622,003	
	1946	1,212,209.75	901,506.61	827,040	
	1947	1,398,106.01	1,093,083.07	877,409	
	1948	1,828,606.93	921,674.25	841,839	
	1949	1,644,382.17	894,646.31	794,306	450
San Bernardino	1945	73,368.20	59,485.46	56,806	
	1946	100,516.25	74,000.59	80,591	
	1947	124,600.75	111,071.17	88,467	
	1948	157,312.25	131,196.77	83,933	
	1949	146,386.20	105,705.65	76,882	27
San Diego	1945	126,409.83	111,335.86	113,537	
	1946	153,989.47	126,077.85	137,744	
	1947	184,928.05	155,148.18	136,130	
	1948	238,981.70	154,027.23	128,547	
	1949	215,387.53	125,851.51	123,381	25
San Francisco	1945	163,679.60	99,285.33	127,105	
	1946	179,037.02	138,878.22	107,814	
	1947	221,890.68	151,849.04	98,725	
	1948	206,535.85	127,928.71	87,760	
	1949	224,155.85	131,328.17	91,539	28
Santa Cruz	1945	24,497.95	28,614.05	17,404	
	1946	32,986.05	39,876.92	22,197	
	1947	34,978.40	41,815.81	19,320	
	1948	39,234.10	37,342.10	17,064	
	1949	38,330.65	32,215.58	16,134	10

As a matter of information the fees to be charged and collected by the Recorder are as indicated below:

FEES TO BE CHARGED AND COLLECTED BY THE COUNTY RECORDER (DEERINGS POLITICAL CODE AND GOVERNMENT CODE OF CALIFORNIA 1947 & 1949 SUPPLEMENT, SECTIONS 27360-27382)

ARTICLE 5

Sec. 27360. FEES TO BE CHARGED AND COLLECTED. For services performed by him, the county recorder shall charge and collect the fees fixed in this article. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27361. RECORDATION. The fee for recording every instrument, paper, or notice required by law to be recorded is ten cents ($0.10) a folio. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27362. INDEXING. The fee for indexing every instrument, paper, or notice is ten cents ($0.10) for each name. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27363. FILING. The fee for filing every instrument, paper, or notice for record, and making the necessary entries thereon is one dollar ($1), except that the minimum fee for filing for record, recording, indexing and making the necessary entries on any written instrument, paper or notice, except as otherwise provided by law, is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1; Amended by later act passed at same session, Stats 1947, ch 844, Sec. 2.)

Sec. 27364. CERTIFICATES UNDER SEAL. The fee for each certificate under seal is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27365. COPIES OF BIRTH, DEATH OR MARRIAGE CERTIFICATES. The fee for any copy of a birth, death, or marriage certificate, when the copy is made by the recorder, is the same as is payable to a state or local registrar of vital statistics. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27366. COPIES OF OTHER RECORDS OF PAPERS. The fee for any copy of any other record or paper on file in the office of the recorder when the copy is made by him, is ten cents ($0.10) a folio. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27367. EXAMINING AND CERTIFYING COPY. The fee for examining and certifying to a copy of any record or paper on file in the recorder's office when the copy is prepared by another is three cents ($0.03) a folio for comparing the copy with the original. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27368. ENTRY OF DISCHARGE, CREDIT OR RELEASE. The fee for every entry of discharge, credit, or release on the margin of record, and index-

ing the entry is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27369. SEARCHING RECORDS FOR BIRTH, DEATH OR MARRIAGE CERTIFICATE. The fee for searching the records of his office for a birth, death, or marriage certificate is the same as is payable to a state or local registrar of vital statistics; in all other case, for each year, fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27370. ABSTRACT OF TITLE. The fee for an abstract of title is twenty-five cents ($0.25) for each conveyance or encumbrance. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27371. MAP OR PLAT COPIED IN BOOK OF RECORD. The fee for recording each map or plat where it is copied in a book of record is ten cents ($0.10) for each course. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27372. RECORDING OR FILING MAP OR PLAT WHERE LAND SUBDIVIDED. The fee for recording or filing each map wherein land is subdivided in lots, tracts, or parcels is five dollars ($5). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27373. FILING BUILDING CONTRACTS, PLANS, AND SPECIFICATIONS. The fee for filing building contracts, plans, and specifications is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27374. FIGURES OR LETTERS ON MAPS OR PLATS. The fee for figures or letters on maps or plats is ten cents ($0.10) a folio, except that the fees for recording any map shall not exceed fifty dollars ($50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27375. ACKNOWLEDGMENTS. The fee for taking an acknowledgment of any instrument is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27376. FEE FOR FILING CERTIFICATE OF REGISTRY OF MARRIAGE. The fee for filing a certificate of registry of marriage to be paid by the county clerk is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1; Amended by later act passed at same session, Stats 1947, ch 1303, Sec. 3.)

Sec. 27377. FILING NOTICE OF ESTRAY STOCK. The fee for filing a notice of estray stock and all services in estray cases is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27378. RECORDING MARKS OR BRANDS. The fee for recording each mark or brand is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27379. ADMINISTERING AND CERTIFYING OATHS AND AFFIRMATIONS. The fee for administering and certifying each oath or affirmation is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27380. FILING, INDEXING, AND KEEPING PAPERS NOT REQUIRED TO BE

RECORDED. The fee for filing, indexing, and keeping each paper not required by law to be recorded is one dollar ($1). (Amended by Stats 1949, ch 62, Sec. 1.)

Sec. 27380.5. MARGINAL REFERENCE. The fee for making a marginal reference to a document previously recorded is ten cents ($0.10) on each and every instrument requiring this service. (Added by Stats 1947, ch 844, Sec. 3.)

Sec. 27381. MILITARY DISCHARGES, ETC. No charge or fee shall be made for recording, indexing, or issuing certified copies of any discharge, certificate of service, certificate of satisfactory service, report of separation, or notice of separation of any officer, commissioned warrant officer, warrant officer, flight officer, cadet, midshipman, noncommissioned officer, petty officer, soldier, sailor, or marine separated, released, or discharged from the Army, Navy, Marine Corps, Coast Guard of the United States, Women's Army Corps, Women's Army Auxiliary Corps, Women's Reserve of Navy, Marine Corps, or Coast Guard, or from the Army and Navy Nurse Corps. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27382. FILING, INDEXING NOTICES OF FEDERAL TAX LIENS AND CERTIFICATES OF DISCHARGE. The fee for filing and indexing each notice of lien and each certificate of discharge for internal revenue taxes is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

B. TITLE INSURANCE

Figures as to the volume of business of title insurance companies, their costs of doing business, and their income are not believed to be pertinent to this study. It is sufficient to say that the business is large and extends throughout the State. Of direct interest, however, is the size of fees charged for insuring titles to properties which are within the range of values of those that have been registered under the Land Title Law. In the table which follows the fees shown are those generally in use throughout the state. Some companies require that escrow service be included so that their fees will be found to be larger.

Partial
SCHEDULE OF FEES FOR POLICIES OF TITLE INSURANCE
Effective in Los Angeles County, July 1, 1950

Amount of Insurance	Owner's, Joint Protection, or A.T.A. Policy	Loan Policy
$ 250 or less	$16.00	$12.80
251 - 500	19.00	15.20
501 - 750	22.00	17.60
751 - 1000	25.00	20.00
1001 - 1500	28.00	22.40
1501 - 2000	31.00	24.80
2001 - 3000	34.00	27.20
3001 - 4000	37.00	29.60
4001 - 5000	40.00	32.00
5001 - 6000	43.00	34.40
6001 - 7000	46.00	36.80
7001 - 8000	49.00	39.20
8001 - 9000	52.00	41.60
9001 - 10000	55.00	44.00
10001 - 11000	58.00	46.40
11001 - 12000	61.00	48.80
12001 - 13000	64.00	51.20
13001 - 14000	67.00	53.60
14001 - 15000	70.00	56.00
15001 - 16000	73.00	58.40
16001 - 17000	76.00	60.80
17001 - 18000	79.00	63.20
18001 - 19000	82.00	65.60
19001 - 20000	85.00	68.00

As used in this schedule, the word "Owner's ", "Loan", or "Joint Protection" Policy refer to the California Land Title Association Standard Coverage Policy form. As used in this schedule, the word "A.T.A." Policy refers to the American Title Association Loan Policy form.

PART IV

CONCLUSIONS

Chapter 1: DEFECTS IN THE TORRENS SYSTEM IN CALIFORNIA
(By University of Southern California)

The purpose of this Chapter will be to summarize briefly the numerous defects in the California Recording System. No attempt will be made at this point to offer any constructive method of improvement. Any statements of that nature would appear logically in the second report. (See Chapter 4.)

The defects may be classified in terms of Internal and External defects and will be treated under those headings.

I. INTERNAL DEFECTS

These defects result from the nature of the Torrens System and the work involved in carrying out the provisions of the Land Title Law. They can be summarized as follows:

A. The Torrens System requires a considerable amount of work in connection with the conveyance of a piece of real property.

First: Additional documents must be filed by the parties involved in a transaction. For example: affidavits, court orders, et cetera. This makes more work for the parties to the transaction. Also, additional notations must be made on all documents, such as deeds, filed with the Registrar.

Second: Elaborate records must be kept by the Registrar's Office. A separate certificate for each transfer of a piece of property must be issued, requiring a considerable amount of copying from former certificates. This, of course, creates a possible source of error in copying, which in turn may result in loss to one of the parties to the transaction. The staff in the Registrar's Office must be of an extremely high calibre in order to avoid errors as much as possible.

Third: In order to register the property it is necessary to have a sufficient title search made, surveys and examinations conducted, all of which require time and money.

These various items mean more work for all persons concerned and result in a cumbersome system.(1)

B. The Certificate of Title which is on file in the Registrar's Office merely shows a summary of the outstanding encumbrances against a particular piece of property. This may not give a prospective purchaser sufficient information and it will be necessary to refer to the actual documents filed with the Registrar.(2) This again results in additional work. It should be remembered also, that such a system does not eliminate the necessity for the services of an attorney to interpret the effectiveness of these encumbrances against the property. The Registrar cannot give any opinion in this regard.

C. The system works a hardship on persons dealing with Torrens property. For example: a mechanic who has done work on Torrens property must determine at his peril that such property is registered property, and must, therefore, file his claim of lien with both the recorder and the registrar. If he fails to do so, he risks the disallowance of his claim.(3) This is a burden on a mechanic unfamiliar with such a system.

D. The Torrens System does not allow any registered property to be acquired by adverse possession.(4) This has been the subject of some criticism.(5) From time immemorial people have used property that has been abandoned or unused for a long period. This was looked on with favor by the various governments since idle land is unproductive. Since this was favored, the law developed a theory that an occupant of land which had been left uncared for, could acquire title to such land after a certain length of time and after complying with certain specific requirements. This policy of encouraging the use and benefit of idle land has been completely done away with by the Torrens System. This is the basis for the criticism of the provision that no land can be acquired by adverse possession under the Torrens System.

E. Withdrawal of property from the Torrens System was until recently not permitted. The severe criticism of this finally led to a change in the law which now permits withdrawal. This move was however, opposed by some who claim that this breaks down the entire system.

By allowing people to withdraw their property it was felt that the System would soon become non-existent by reason of the withdrawal of the majority of property registered under the Torrens System. However, since the California System has proved unsatisfactory it would seem fair to allow persons who desire to withdraw their property the opportunity of so doing.

II. EXTERNAL DEFECTS

These defects result mainly from court interpretations of the Torrens Statute and from the failure of the System to operate in practice as it would in theory.

A. The most important defect in the Torrens System is the fact that a Certificate of Title is not a conclusive determination of title. This means that a purchaser of registered property may be subject to interests which do not appear on the Certificate through fraud and defects in the original registration proceedings.(6) This causes a lack of security to a purchaser interested in buying Torrens property. This defect is mainly the result of court decisions and interpretations of the California Land Title Law which have sapped the effectiveness of the Torrens System. Situations in which the purchaser is subject to unregistered interests are set forth in detail in various portions of this paper and it is sufficient at this time merely to call attention to the existence of this serious defect.

B. In addition to loss from unregistered interests as discussed above,

the owner of registered property may suffer loss through a forgery of his certificate of title. His recourse to the Assurance Fund as has been discussed previously, has been wiped out since the fund is depleted. This leaves him with little or no remedy for his loss.(7) The owner of registered property must, therefore, guard his certificate because it represents the property he owns. If, even without any negligence on his part, he loses it, he runs the risk of forgery by one who finds it and the ultimate loss of his property. This is, indeed, a defect that should be given due consideration.

III. CONCLUSION

These defects account, to a great extent, for the lack of effectiveness of the Torrens System in California. In theory, the system appears to be ideal. In actual practice, it has been an unsuccessful venture. Part of the trouble may be attributed to lack of knowledge on the part of the general public, inertia, and lack of interest by the people in a different type of property conveyancing than the one they have been accustomed to. However, a Torrens system similar to the California system has been used elsewhere and proven satisfactory.

This concludes the Survey of the Statutory and Case Law in California involving the California Registration System. The later report will consider the essential elements for improvement in the California system.

FOOTNOTES to CHAPTER 1: DEFECTS IN THE TORRENS SYSTEM IN CALIFORNIA

1. 7 California Law Review, p. 75.

2. Crouch, Winston J., Analysis of Measures on the Ballot, Nov. 7, 1950 prepared under a grant from the Haynes Foundation.

3. Hammond Lumber Co. v Moore, 104 Cal App 523.

4. Land Title Law, Section 35.

5. 14 California Law Review, p. 237. Thompson, Real Property (Perm. Ed.), Vol. 5, Section 4438.

6. See Chapter 4 of Part II for sufficient references to statutory and case law illustrating this topic. See particularly Powell, Richard R., Registration of the Title to Land in the State of New York (1938), p. 54.

7. See Report on the Statistical Aspects of the California Registration System prepared by J. W. Dougherty, Research & Editorial Assistant, State Lands Commission pointing out the fact that the payments into the fund are very small, contributing to its inadequateness.

Chapter 2: DEFECTS IN THE CALIFORNIA RECORDING SYSTEM
(By University of Southern California)

The purpose of this chapter will be to summarize briefly the numerous defects in the California Recording System. No attempt will be made at this point to offer any constructive method of improvement. Any statements of that nature would appear logically in the second report. (See Chapter 4.)

As was stated in the Introductory Chapter to this paper, the defects may be classified in terms of Internal and External defects and will be treated under those headings.

I. INTERNAL DEFECTS

These are familiar to all persons who have ever searched a title in California. They consist of the following items:

A. Cumbersome, voluminous records in the County Recorder's office.

B. Poor search methods. There is no tract index, which makes it necessary for a purchaser to search through the alphabetical indexes for the various grantors and grantees in the chain of title.

C. Since no legal description is contained in the indexes it is necessary to examine each document given by anyone in the chain of title to determine whether it affects the property in question.

D. In certain instances a subsequent purchaser must search for instruments executed after a grantor in the chain of title had already parted with title. This puts an extremely great burden on the subsequent purchaser. See Chapter 9 of Part III for a thorough discussion and analysis of this problem.

E. Records are not in a central place such as the County Recorder's office. Some records are in the Tax Collector's office, County Clerk's office, et cetera. This requires a further search.

F. Assuming a sufficient search could be made, a legal interpretation of the documents would then be required. Just finding the instruments in the chain of title does not complete the job. Their legal effect must then be determined.

G. The index of grantors and grantees is defective since it fails to show interests created by a grantor in favor of the grantee in the land retained by the grantor. This can best be illustrated by the following example:

A, owner of lots #1 and #2 conveys lot #1 to B by deed containing mutually enforceable restrictive covenants which are applicable to both lot #1 and lot #2. Later, A sells lot #2 to C, who has no actual notice of the restrictions imposed on lot #2 by the former deed to B. It has been

decided in California that C would be subject to the restrictions against lot #2 in favor of B, the owner of lot #1. The difficulty of such a decision lies in the fact that the index of grantors and grantees will merely show A as the grantor of lot #1 and B as the grantee. It will not show that lot #2 is affected in any way by the conveyance or that B has been given any rights in lot #1. This will, of course, show in the deed from A to B. The result is that C is required to search all deeds in the record executed by A conveying neighboring lands to find such restrictive covenants. Such a situation could be remedied by use of a tract system whereby all restrictions against lot #1 would be shown together. Another possibility would be to require such an interest to be indexed in A's name thus warning a subsequent purchaser of such an outstanding interest. (See Chapter 9 of Part III for a thorough discussion of this problem.)

II. EXTERNAL DEFECTS

These defects consist of matters which affect the title of a certain parcel of land, but which do not appear upon the record. In some instances a bona fide purchaser is protected so that the defect is not as serious as would seem at first glance. The general problem encountered in all these matters is that an intending purchaser desires to know what outstanding encumbrances the property is subject to. The recording system is defective in every instance in which the purchaser must ascertain any information of this nature from matters which do not appear of record. The most important matters of this type are as follows:

A. Interests arising out of possession (unrecorded).

A purchaser is required to take subject to any interests he would have discovered by a reasonable inspection of the premises. Some instances of such situations are as follows:

1. Adverse possession:

In California the elements of adverse possession consist of possession which is open, notorious, adverse, exclusive, and continuous for a five-year period. In addition, the California statute requires the adverse possessor to pay all taxes assessed against the property for these five years.(1) When an adverse possessor meets these requirements he becomes the owner under an original title and his title will not appear of record. A person who subsequently purchases this property in good faith from the party who appears on the record to be the owner will not prevail as against the party who acquired title by adverse possession. He is said to have notice of the adverse possessor's rights from the fact of his possession.

2. Easements acquired by prescription (similar to adverse possession).

3. Possession may also put a subsequent purchaser on notice of interests of persons in the property which arise out of unrecorded instruments. These interests, of course, arise out of the instrument, not out of the possession itself and, therefore, properly should be considered in connection with the next paragraph.

B. Interests which are not of record, but of which the intending purchaser has actual notice or notice from facts and circumstances that would put a reasonable man on inquiry. (Possession is one of the facts and circumstances which put a party on notice of interests arising from unrecorded instruments.) The purpose of this is, of course, to avoid frauds, but could be carried too far in charging a person with notice where he had no actual notice but merely notice of suspicious circumstances.

C. Errors: When an error appears in the record it has been decided that a bona fide purchaser of the property may rely on the condition of the record. This protects the purchaser but puts a burden on the grantor to check the record after a deed is recorded to determine whether it has been correctly entered.

D. Mechanics' and Materialmen's Liens: Since these liens relate back to the date on which the materials were furnished, there is a short period of time in which even a bona fide purchaser would be subject to such liens although not on the record. Of course, this is again a matter arising out of possession and the purchaser could discover the presence of such materials on the real property in question and inquire whether any such liens would be involved.

E. Non-Delivery of Deed: This can be best shown by the following illustration:

O, owner of Blackacre, executes a deed to A but does not give it to him. A takes the deed, without permission, from O's possession, without negligence on the part of O, and transfers the property to P, a bona fide purchaser, giving him a deed to the property. In an action between O and P the California law permits O to recover the property since there was no passage of title to A, who had stolen the deed. Even though the subsequent purchaser, P, was in good faith, he cannot prevail since he did not receive title to the property from A.(2)

This is one of the unfortunate situations in which a subsequent bona fide purchaser may lose the property due to an off-the-record matter.

F. Lack of Authority: There are many situations in which an agent may exceed his authority in dealing with the sale of land. In some of these instances a subsequent bona fide purchaser of the property may be protected depending on circumstances and in other situations he will not be protected. The following example illustrates a situation in which the subsequent purchaser is not protected:

O, the owner of Blackacre, executes a deed to A and delivers it to X to act as an escrow agent. X fails to follow the instructions given to him by O and delivers the deed to A before the conditions of the escrow have been complied with. A later sells the property to P, a bona fide purchaser, and gives him a deed. In an action brought by O against P to recover the property, the California court has held that O should recover.(3) The basis for this is that no title passed when X, the escrow agent, violated his instructions

and gave the deed to A. Since A had no title he could not pass any title to P. This is, therefore, an instance in which a subsequent purchaser is subject to the off the record defense of lack of authority of an agent. There are, however, other situations in which the subsequent purchaser would not be protected as discussed in Chapter 2 of Part III.

G. ILLEGALITY: If property is sold by a corporation in violation of a statute (e.g. usury laws), the transaction is void. A subsequent purchaser in such a situation would be given no protection. When a transaction is void no title passes to a subsequent purchaser.(4)

H. FORGERY: A forged instrument is void and ineffectual for any purpose. Even though it is recorded it does not create any rights in parties claiming through or under it.(5) For example:

O is the owner of Blackacre under a recorded deed. X purports to convey O's property to A and forges O's name to the deed. This instrument is recorded. A subsequently conveys Blackacre by deed to P, a bona fide purchaser. P relying on the record title of A purchases the property and is then sued by O, the original owner. In such a situation P will not be protected since he has never acquired title to the property. Forgery is, therefore, another one of the off-the-record matters to which a bona fide purchaser may be subjected.

The certificate of a notary is intended to guard against forgeries, but due to the summary way in which an instrument is notarized it is in fact not much of a guaranty against forgeries.

I. FRAUD: There are two types of fraud which the law recognizes and which have different results.

1. Fraud in the Inception of a Contract: This is the type of fraud which vitiates a transaction and makes it void, thus giving no protection to innocent purchasers.(6) For example:

O is the owner of lots 1 and 2. He agrees to sell lot 1 to X and signs a deed transferring lot 1 to X. This deed contains the description of lot #1 when O signs it. X fraudulently adds (after O has signed the deed) the description of lot #2 and records the instrument. X then purports to convey lots 1 and 2 to P, a bona fide purchaser. In an action by O to recover possession of lot #2, O would recover. P would not be protected since this is the type of fraud which makes a transaction void and no title passes. This fraud is practically tantamount to a forgery.

2. Fraud in the Inducement: This type of fraud can only be used as a basis of rescission of a contract when the parties to the fraud are involved in the action or a subsequent purchaser who does not meet the requirements of a bona fide purchaser. When the interests of a bona fide purchaser are involved the bona fide purchaser is protected.(7) For example:

O, owner of Blackacre was induced to sell his property to X for a sum far below its market value on X's misrepresentation that a freeway would be

cut through that property. This was in fact untrue, but O relied on it. The deed was recorded. X then conveyed the property to P, an innocent third party who paid value in good faith. P in this situation would be protected since he acquired legal title which cuts off the prior equity which O had to rescind the contract for fraud. O would have a right to damages against X provided the necessary elements of fraudulent misrepresentation were proved.

This is, therefore, an illustration of a situation in which a subsequent bona fide purchaser would be protected against an off the record matter. However, the subsequent purchaser would be required to appear and defend his rights and prove that he is a bona fide purchaser. This alone is a burden placed on the purchaser. If he fails to sustain such burden he will lose the property.

J. LEGAL DISABILITIES: There are various types of disabilities: infancy, insanity, deprivation of civil rights due to certain types of imprisonment. When the grantor is subject to certain disabilities his contract is void and a subsequent bona fide purchaser is not protected. In other situations the contract is merely voidable and the subsequent purchaser is protected. For example, the contract to sell real property executed by an infant under 18 years of age is void, while such contract executed by an infant between 18 and 21 years of age is merely voidable.(8) The inference from this would be that a subsequent bona fide purchaser in the first case would not be protected, but a subsequent bona fide purchaser in the second case would be protected.

K. VOID DECREES ON WHICH JUDICIAL SALES ARE BASED:

Judicial sales may be set aside if they are based on an invalid decree. If the court has no jurisdiction over the parties or subject of the action, the decree will be void and any sale of real property held in pursuance thereof will also be void. An innocent purchaser who later acquires such property will not be protected.(9) For example: probate proceedings are held and property sold and distributed on the basis of the decree rendered in the probate proceedings. It is later discovered that the "decedent" was not dead, making the entire probate proceedings, decrees and sales invalid. Innocent purchasers who acquired property sold in connection with these proceedings will not be protected.

This is, therefore, still another instance in which a subsequent purchaser is subject to matters which are not on the record when he purchases the property.

Closely connected with this problem are cases in which judicial procedure on which a decree and sale is based is irregular. In some instances where there have been irregularities a subsequent purchaser is not protected. To the extent that this is true, a subsequent purchaser is put on inquiry as to all procedural steps connected with any decrees and judicial sales of the property that have occurred in his chain of title.

L. DESCENT AND HEIRSHIP: The problems of this nature were discussed thoroughly in Chapter 2 of Part III and a short reference to them is all that is necessary at this point. If the heir of a decedent who has died intestate takes real property by succession and transfers that property to a bona fide purchaser the purchaser's title remains inconclusive for a period of four years according to a California statute. If during that four years a will of the decedent is found which devises this property to someone other than the heir who acquired it by succession and such will is duly proved or a notice thereof is recorded, the bona fide purchaser will lose his right to the property in favor of the devisee under the will. If, however, four years elapse without such will being discovered the purchaser's title becomes conclusive as against any will executed by the decedent which may later be found.(10)

If the decedent died leaving a will devising real property to a specific devisee and later a second will is discovered leaving the property to another, a bona fide purchaser from the first devisee is fully protected.(11) For example:

D, decedent, died leaving a will which gave Blackacre (which he owned at his death) to A. A decree of distribution awarded this property to A who sold it to P, a bona fide purchaser. Subsequently, a later will was discovered willing this same property to X. In a suit brought by X against P, the bona fide purchaser, P would be allowed to retain the property. The theory on which such a conclusion is based is that acquisition of legal title by a subsequent bona fide purchaser cuts off all prior equities such as that of X.

The danger from the discovery of a will when the decedent died intestate or the discovery of a second will when he died testate is not a very serious off-the-record matter as can be seen from this series of examples, since a bona fide purchaser is generally protected. Of course, he is put to the task of proving his bona fide purchase, et cetera.

M. MARITAL INTERESTS: Marriage automatically creates interests in the husband or wife in certain property. Often these marital interests do not appear on the record in the County Recorder's office and thus a subsequent purchaser of the property is not made aware of such interests. The records in the County Marriage Bureau are likewise insufficient.

In some instances a subsequent bona fide purchaser is protected against a spouse whose interest does not appear of record, while in other instances he would not be so protected. This can best be illustrated in the following manner:

H and W (husband and wife) own Blackacre and hold title to it as community property. The record, however, shows H as the owner of the property by reason of a recorded deed to the property to him as grantee. Nothing in the deed indicates that he is married and W's interest does not appear of record. According to California statute, the wife must join with the husband in executing a deed selling this property.(12) If H conveys this property to P, a

bona fide purchaser without notice of the wife's interest, but fails to have W join in the conveyance, W has the right to set aside the conveyance as to her one-half interest, providing she did not consent to the transfer by H. The wife is given, by statute, a period of one year from the date of filing of the deed to the bona fide purchaser, to set aside this deed and assert her one-half interest. If W in the above example failed to act within that one year period, she would lose all such rights and P, the bona fide purchaser, would prevail.(13)

This illustrates a situation in which an innocent subsequent purchaser, relying on the state of the record title, may lose the property he has purchased to a person whose interest does not show on the record. His title, in effect, is inconclusive for one year. This illustrates another defect in the Recording System as it exists in California.

This concludes the Survey of the Statutory and Case Law in California involving the California Recording System. The later report will consider the essential elements of a good Recording System with some suggestions for improvement in the California System.

FOOTNOTES to CHAPTER 12: DEFECTS IN THE CALIFORNIA RECORDING SYSTEM

1. See Civil Code Section 1007 and Code of Civil Procedure Sections 323, 324, 325 for statutes relating to adverse possession. See 2 Southern California Law Review 139 for a discussion of adverse possession.

2. Gould v Wise, 97 Cal 537.

3. Promis v Duke, 208 Cal 420.

4. Haymond, T. W., Title Insurance Risks of Which the Public Records Give No Notice, 1 Southern California Law Review 422.

5. Haight v Vallet, 89 Cal 245; Trout v Taylor, 220 Cal 652, Jones v Coulter, 75 Cal App 540; Wunderlin v Codagan, 50 Cal 613.

6. Haymond, Title Insurance Risks, cited supra, footnote #4; Gage, D. D., Land Title Assuring Agencies (1937).

7. Ibid.

8. Civil Code Sections 33 and 34.

9. Parsons v Weiss, 144 Cal 410. Haymond, Title Insurance Risks, cited supra, footnote #4.

10. Probate Code Section 322.

11. See Chapter 2 of Part III for citations to cases involving this situation.

12. Civil Code Section 172a.

13. Ibid. Trimble v Trimble, 219 Cal 340; Mark v Title Guaranty & Trust Co., 122 Cal App 301; see also 21 California Law Review 170 and 7 Southern California Law Review 106. For authority indicating that property may be community property regardless of the record title see the case of Horsman v Madden, 48 Cal App (2) 635.

Chapter 3: FEATURES OF GOOD LAND TITLE SYSTEMS
(By Mr. Nathaniel B. Bidwell)

From the entire context of the report and the first installment of the data submitted by the University of Southern California and from the comparative data in the counties beginning with Los Angeles County through to the others, submitted in detail, I cannot see that the system adopted, an instituted service in California, can be reconciled with a maximum of accuracy or exactness in the examination of title. It seems unfortunate that, for example, the question of the validity of judicial procedure under foreclosure suits could possibly arise under a properly statutory form of foreclosure. Again, there never should be an absence of statutory law that would allow a question on the passage of title as within the parties or as to third persons to arise under "nondelivery of deeds".

As to special liens, which are material men's liens or mechanics' liens, California laws should require immediate recording in the regular Registry of Deeds of the county where the land lies, as does the statute in Massachusetts.

Future judgments and decrees all are taken care of in the original and appellate jurisdiction of the courts and finally are recorded as against the world as an action in rem.

The authority of an agent or corporate officer should be questioned and disposed of at transfer and, except in the case of fraud, should be binding against all parties.

I note by the report on Los Angeles County, dated February 19, 1950, that it is required in the Land Court system that the applicant must prove ownership by furnishing an abstract or a policy of title insurance. If the data before me is a sufficient criterion by which one may judge, no comprehensive abstract could be presented under the system of recordation that seems to obtain in your State. Under the Land Court system in Massachusetts, the title examiner for the Court is appointed by the Court and he is able to obtain a complete examination of a title from the simple system which has been thoroughly outlined in this report. Again, no policy of title insurance can be sound that is based upon inaccurate records or inadequate records of recordation.

Once the system of recordation is simplified so that all so-called encumbrances which affect the title to real estate are correlated under a simple accurate system, land can be registered as outlined in the Massachusetts Statute, Chapter 185, attached to the first portion of my report, and the said Assurance Fund only guarantees against error on transfers or re-registrations after the original registration.

The historic record is the basis for effectual conclusions of the workability of a system. The simple recordation system and the regular outline of registration in fifty-two years in the Commonwealth has resulted in $3000 worth of loss to the Assurance Fund.

I understand again from the report of February, 1950, from the Los Angeles data "the State Assurance Fund must assume sole responsibility for clear title." To me this is a serious undertaking, wholly unnecessary, and a responsibility not based upon the probability of accurate data presented upon the original registration.

Attached to this report is a list of the various counties of the Commonwealth and of their population, all of which are small as compared with California, but the difference in quantity is not an insurmountable barrier to establishing a system of title recording regardless of land registration. In the economic world this title recording is of the highest importance and a simple, accurate system is a condition precedent to successful title examination, investment marketability and security. Insofar as my commission allows me, and even beyond, I recommend a very drastic revision of the recordation system of your State.

This is important, as I observed that the State Assurance Fund assures future increased values of property for the original payment of one-tenth of one per cent of the assessed value at the time of the original registration except in the interim between the decree of original registration and the end-of-the-year limitation period. Under the Land Court of Massachusetts, there is no such guarantee of the Assurance Fund as to the original value and therefore no guarantee of the Assurance Fund for increased value because of any act in regard to the original registration. As I have said before, the Assurance Fund is a guarantee against errors following original registration, and therefore there exists the potentiality of guaranteeing increased values similar to the example given in the attached comments to the Los Angeles County report for the original fee. You will recall that, regardless of the original value of the land, the maximum that can be collected is $1000 under our statute. Therefore, under these two considerations, the recordation system as a basis for title examination is of the utmost importance in its sequence and continuity and comprehensiveness of record. It would appear to me, if I understand the comparative data given, that it would be well nigh impossible to be certain of a certification of title under the California system presently obtaining. Again, such an improved recordation system is essential because of the tremendous value indicated in the transactions daily in the Los Angeles County recording office. If it can be secured, a recording system similar to that outlined by General Laws, Chapter 183, of Massachusetts, is an integral system recommended and promulgated as a result of examination of the recording systems in the various states and territories as outlined in other parts of my report. Without a recent examination of amendments in other jurisdictions, which examination is not comprehended in my commission, I therefore finally recommend that such a system be adopted at the earliest date obtainable.

It has been the history that such simplified recordation systems have opposition from title companies, and from abstractors and conveyancers. The test, however, is the value to the public rather than to the profession. In addition to accuracy and the minimum of errors, it eliminates the requirement of free service to be performed by County Registers' or County Recorders'

offices. I recommend a system of fees that will approximate the cost of services, which services should be limited directly to the recording and preparation of indexes and records for agencies separate and apart from the Recorder's office, inclusive of lay individuals. I note the recommendation of 1943-44 of a photographic method of recording. That has been adopted long since in our County and districts of the County, and has resulted in a great saving in hastening the return of the recorded deed to the grantee, etc. in the point of time.

Again, it seems to me that the duplication in examination of title, either within the confines of the Torrens system or without, could be eliminated by the adoption of a simple system of recording titles. To have the potential encumbrances spread out over varied points of record, and to have so many possible encumbrances not a matter of centralized record, makes a title examination expensive if at all feasible.

In addition to the repetitious comments I have made throughout this part of my report, I would like to call specific attention to certain provisions of law which would be of value in a recording system:

1. A deed executed and delivered would be sufficient without any other act to convey land as between the grantor or lessor and persons having actual notice, except this conveyance of a fee, or of a lease for more than seven years or for life, cannot be valid against any person other than the grantor or lessor unless it is recorded in the Registry of Deeds in which the land lies. The purpose of this provision is to take the place of a livery of seisin, and is to protect subsequent purchasers against prior or unrecorded conveyances and to give legal sanction to the antiquated rules adopted by judicial decisions by giving constructive notices to purchasers and creditors. You will note that this provision is substantially identical with the words of the Federal Statutes, 41 U.S., p. 1000.

2. It should be provided further that the record of a deed and a lease or a Power of Attorney, duly acknowledged, becomes conclusive evidence of the delivery in favor of purchasers of value without notice.

3. A statement, sworn to before an officer, and showing a person's married or unmarried status, kinship, and birthday, should be recorded and become admissible in evidence in support of a title in any court of a state.

4. A grantee's name and residence and address should be contained or endorsed on a deed.

5. There can be provision for a short form of Warranty or Quitclaim Deeds.

6. The word "grant" can be used as a complete and sufficient word of conveyance as against the old "give, bargain, sell and convey".

7. It can be provided that the words "heirs and assigns" are not necessary to give an estate in fee and that the law construes a conveyance as such unless the deed specifically provides otherwise.

8. When a conveyance by deed or will is made the word "use" shall be implied or the words "in trust" should also be used.

9. It can be provided that easements, rights, privileges, and appurtenances are by implication all part of the transfer, unless the deed or conveyance specifically excludes them.

10. A mortgage entitled "Mortgage Deed" is a deed to heirs and assigns and contains full warranty covenants and various statutory conditions in regard to payment or redemption or foreclosure.

11. Various mortgages given to banks (national, cooperative, savings) may all be provided for simply by statute and a general provision that a holder of a mortgage may upon foreclosure purchase at such a sale.

It may be noted here that it has recently been provided under our Commonwealth that foreclosures must be by way of equitable action, which further simplifies the record of titles.

12. A mortgage may be assigned from one mortgagee to another by a simple paper recorded and witnessed.

All these instruments, by provision of law, must be acknowledged.

13. In order to have a substantial, successful Torrens Land Registration System, there must exist a recording system that possesses maximum accuracy, that possesses minimum cost of examination of title, and that provides for examiners who are competent.

14. As in Massachusetts, so can it be in any state. There should be in the Land Court judges whose jurisdiction is confined solely to land titles and not inclusive of the jurisdiction of torts, divorce, criminal law, etc., as I understand obtains in Cook County, Illinois. In Massachusetts these judges are primarily located in the Capitol in Boston, but may at their discretion hold sittings of Court in any part of the Commonwealth. This might require various locations in the State of California because of its size and inaccessibility to Sacramento from the south and the north, just as certain other of your offices are divided between San Francisco, Los Angeles, Sacramento, etc. This is not an insurmountable difficulty.

15. The recorders, assistant recorders, and engineers in the main office or offices should be of most competent education and experience.

16. The examiners should be chosen by the Court and not by the applicant.

17. As in the Massachusetts Statutes, Chapter 185, all available data should be required to be given in the application, and there should be authority for added examination and surveys.

18. The system of notice, whether by personal posting or by publication, should be at a maximum, with allowance of sufficient time to permit all parties interested therein to be heard and to assert their rights. Under this system there should be a decree in rem conclusive against the world, including the State of California. There should be a limitation of time after the decree in which all questions except fraud are forever barred.

19. The various Registries of Deeds for the simple recordation system or for the division of the Registry that handles the Torrens system should be personneled by specialists in that line and should be free from politics.

20. An assurance or indemnity fund, because of the suggested procedure as required here of no defaults but complete hearings on each title, with limitations after decree, should be confined in its guarantee to errors after original registration. An observation on this feature, where your applicant furnishes his own abstract on a faulty recordation system, is that your Assurance Fund is always in danger.

21. An assurance fund depletion should not be dependent upon a title insurance company's guarantee or vice versa.

It is beyond my commission and it would be impossible, with the data that I have or my lack of knowledge of your conditions in California, to suggest or to outline a schedule of individual costs and fees as well as of salaries of employees and of the Court. This is dependent upon a state's condition, size, fixed financial programs and attitudes, all differing from another state or locale as one person inherently differs from another.

It is recognized that no one feature or features can make a successful recording or registry system workable, but there are certain salient elements, in my opinion, which are essential to its advancement and efficiency, such as a minimum of political attitudes, and the employment of specialists for the Court's engineers, examiners and personnel. Lastly, but certainly not the least by any manner of means, is the attitude of the conveyancers and the bar of a state toward a possible destruction of present sources of income of independent examinations for title guarantees. I am informed that in every state in the Union, there has been criticism and objection to a change, based partly upon such a destruction of a recognized and somewhat lucrative business. This is only human, but I do believe that growing cooperation of conveyancers and lawyers with property owners and financial interests will be absolutely necessary to fix the marketability of titles and their use as collateral at a minimum of cost. The accumulative tax problem that faces the people of any state from the state level, from the municipal level, from the county level, and moreover from the national level, means an economy to be projected along the lines of titles.

Otherwise real estate will become less and less a basis expedient to industry and free enterprise and, worst of all, the hopes of the small-income class of people, in regard to their homes, and small businesses, and farms, will be defeated.

Water rights for irrigation and for power are a source of complicated title dependency. All these are larger problems obtaining in the State of California than in the Eastern or Middle West States, at least east of the Mississippi River. Coastal States, inclusive of the thirteen original colonies, have had to meet the inaccurate descriptions and rights towards or within the inland waters and the marginal seas, and overlapping and undecided questions. It has been experienced that the Land Court has been the most effective instrument in searching and determining these overlapping rights.

One element which must be taken into account on water rights arises under the granting of licenses by the Federal Government to construct piers or other structures in navigable areas, and the resulting conflict that arises between riparian owners bordering on these navigable waters.

In the conflict that has arisen involving riparian owners on inland waters and marginal seas as to the ownership of and recovery of resources such as fish, gravel, sponges, etc., etc., the Land Court has been an effective institution for the determination of these rights, because all parties in interest are notified and heard, and the constitutional provisions are necessarily strictly observed.

Finally, this report and these observations, criticisms, and recommendations are not given or presumed to be those of perfection or those that could be adopted by a particular jurisdiction without substantial disruption. The determination of their value must necessarily rest beyond my authority, and is subject to the protection, consensus, and reflection of competent minds studying the changing times and problems with the years.

Chapter 4: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE RECORDING AND REGISTRATION SYSTEMS
(By University of Southern California)

INTRODUCTION:

At the beginning the limited scope of this report should be emphasized. It does not purport to pass upon the very broad question whether, in view of the availability of title insurance, any attempt whatever should be made to improve title recording or registration in California. On this broad issue we make no pronouncement at all. The authors of this report are required by their contract with the State Lands Commission to report "on the methods to be followed in applying good land title recordation and registration systems in the State of California." In writing this report we have assumed that it is desired to provide the people of California with systems of registration and recording operated by the government which will be at least equal in efficiency to those operated by the governments of other states of the United States. The facilities made available to the public by privately owned and operated title insurance companies have been left entirely out of consideration.

From the point of view here stated the following recommendations are respectfully submitted. They are based upon a consideration of systems in use in other states and the suggestions of experts in this field.

PART I: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE REGISTRATION SYSTEM

The Torrens System (registration system) has not been used to any great extent in the United States. It has been tried in various parts of the country, but has met with disappointing results. There are a few areas in which it is being used to a very limited extent, i.e. Boston, Massachusetts and Cook County, Illinois. These areas have found the system to be satisfactory, but they are decidedly in the minority.

The reasons for the failure of the Torrens System to succeed in the United States can be traced mainly to the apathy of the people in regard to it. The people are accustomed to the Recording System, cumbersome though it may be, and do not desire to change over to a system which is quite different from that to which they are accustomed.(1) Much of this attitude on the part of the people is due to the fact that the initial proceeding for putting property under the Torrens System is an expensive proceeding. It requires a judicial hearing, title reports, surveyor's reports, the services of an attorney and other incidental matters. These are expenses that are faced when a property owner decides to register his land and they add up to a fairly large sum. There is a saving to future owners of the property since subsequent conveyances are less expensive than they would be under the recording system, but a present owner is not concerned with the savings to such future owners. He is naturally concerned with the expense to him. Therefore, after considering such

expense, a property owner generally decides he will remain under the Recording System where he needs only to pay a small amount for recordin his deed and other documents affecting his property.

The only solution to this attitude on the part of the general public is to make the system compulsory, requiring everyone to register his property. This, of course, has obvious political difficulties, and would not be considered.(2)

If we assume, however, that a Torrens System could be made to operate satisfactorily on a small scale, as it is in Boston or parts of Illinois, the problem that confronts us is why has California's experiment with the Torrens System failed so drastically? There are several defects in the California System which have led to this failure. They will be discussed in detail below, with suggestions for remedying the defects.

The California Registration Law provides for an Assurance Fund for the purpose of protecting registered owners who lose their property due to operation of provisions of this law.(3) For example, A owns registered property. His Certificate of Title to that property is stolen by X, who forges A's name and conveys the property, by transfer of the certificate, to B, who is a bona fide purchaser. According to the provisions of the Registration Law in California, B would be protected, since the certificate is to that extent "conclusive" evidence of title.(4) A's only remedy would be against X who has probably left the State. The purpose of the Assurance Fund is to give A a recovery of money for the value of the land which he has lost through this forgery and theft. The Land Title Law gives him a right of recovery, provided he meets the requirements set up by the law, against the Assurance Fund. Theoretically, this is an ideal solution. It provides for a "certificate that is conclusive", which is necessary for the perfect operation of a Torrens System, and it also provides for protection of the rightful owner, permitting him a money recovery.

The Fund has, however, not worked in the manner in which it was expected to. The reason for this is that the fund is much too small to meet the demands of property owners who have lost their property through conditions which would give them a right to recovery from the fund. The amounts put in the fund consist of a small percentage of the amount collected as fees by the Registrar for his services in connection with Registered (Torrens) Property. These fees are admittedly very low and insufficient to cover the costs of maintaining a Registration System. The amount which goes into the fund is entirely too small to create a fund sufficiently large enough to meet the needs of owners of Registered property.(5) In addition, at the present time, due to the judgment in the Gill case discussed in the first report, the fund has become bankrupt. This leaves the Registered owners with absolutely no protection at all from any Assurance Fund. With a situation like this, a Torrens System could not possibly be successful.

There must be a soundly financed Assurance Fund, large enough to

meet the normal needs of owners of Registered property. In order for it to give adequate security to these owners, it must be supported by the State of California.(6) Any other type of insurance, unsupported by the State, will be inadequate. Without an adequate, workable fund, California can never have a successful Torrens System.

The major problems encountered in connection with California's Registration System stem from the interpretation of the Courts as to the "conclusiveness" of a Torrens Certificate. Section 36 of the Land Title Law provides that the certificate should be "conclusive" evidence of title. This means, in effect, that protection is given to those persons whose names appear on the certificate as having an interest in the property. Anyone who claims an interest in the property, but whose name does not appear on the Certificate is precluded from any interest in the property. His remedy is then limited to damages or a possible action against the Assurance Fund discussed above.

Exceptions are made in the Statute in Section 38, which states that the registered owner holds his property subject to such estates, mortgages, liens, charges and interests which are noted in the last certificate of title EXCEPT:

1. An existing lease for a period of not exceeding one year;
2. public highways; 3. certain taxes; etc.

The California Courts have refused to hold the certificate "conclusive" evidence of title in a series of important decisions.(7) These have been discussed in the first report, but should be referred to briefly at this point. In most of these cases the California Court found that the Court in the original proceedings to register the property had no jurisdiction to make the determinations as to interests in the property. This may have been because of a lack of proper service on parties who had interests in the property, or it may have been due to the Court's failure to have jurisdiction over the property itself, which was the subject of the Registration proceedings. Lacking jurisdiction, it was held, the Court could not effectively preclude the interests of persons to the property attempted to be registered and the entire proceedings were declared invalid. Such decisions naturally shook the confidence of the general public in the Torrens System and the result has been that property owners do not feel that Torrens property is a safe investment.

The following case affords an illustration of this situation:

O, owner of blackacre, brought an action to have his property registered under the Torrens System. He failed to name X, (who was occupying a small section of Blackacre) in the petition and X was not given personal service of the petition and summons. The Land Title Law requires personal service to be given to all occupants of the property sought to be registered. X, having no knowledge of the registration proceedings failed to appear and consequently the property was decreed to be registered in the name of O, with no mention of X's interest which was based on a

boundary agreement previously made with O. Several years later the property was sold to a bona fide purchaser, P, who had no actual notice of X's interest. X brought an action to quiet title and set aside the decree of registration so that he could assert his interest in Blackacre against P. The court in Swartzbaugh v. Sargent(8) under facts similar to those outlined above, held that X was entitled to set aside the decree of registration and assert his interest in the property. The court held that failure to give the notice required by statute (personal service in this case) in this instance meant that no due process had been given to X. It is, of course, necessary to give the type of notice required by the statute in order to give the defendant "procedural due process". It is not necessary, however, that the statute require personal service. It has been held by a series of Supreme Court cases that when an action is in rem (such as the type of action involved in a quiet title action) notice by publication is sufficient--personal service is not necessary unless the statute specifically requires it.(9) When the Court has physical jurisdiction over the real property involved (i.e. the land is within the State in which the court is situated) the court has the right to settle the title to such property.(10) This may be based on publication service as held in these Supreme Court decisions, whether the parties with interest in such property are within the state or not. This means that the California Land Title Law could be amended to require merely service by publication as the method for giving notice in the original proceedings for registration, rather than personal service. The decree granted would then be "in rem" (i.e. conclusive against all the world) and lack of personal service could not be claimed as a basis for lack of jurisdiction and grounds for vacating the judgment in the original proceedings.

In order for the Torrens System to operate successfully, the certificate must be conclusive evidence of title as against all the world.(11) It is proper, however, to allow a short period (as is provided in the Land Title Law) for vacating the decree because of fraud, mistake, or inadvertence. Such action should not be allowed as against a bona fide purchaser of the property, however. After this period of time elapses, the decree in the original proceedings should not be subject to attack.

The Torrens Statute itself has provided for a conclusive certificate of title. Failure on the part of the Courts to recognize the proceeding as one in rem in which rights were established and all other rights cut off, has been largely responsible for the breakdown in the operation of the Torrens System in California.

It should be emphasized that in order to have a satisfactory Registration System there must be a satisfactory Recording System as a basis.(12) This is necessary in order to determine in the original Torrens proceeding which parties have interests in the property which is being registered, so that they can be given proper notice of the Torrens proceeding. If it is difficult to find this information from the Official Records, persons with legitimate interests in the property would not be properly notified and consequently trouble would very likely arise in the

future. The Boston report states this as follows:

> "In order to have a substantial, successful Torrens' Land Registration System there must exist a recording system that possesses maximum accuracy, that possesses minimizing cost of examination of title; and an examiner who is competent."

Improvements in the California Recording System would not only be beneficial in connection with the operation of that system, but also in connection with the operation of the Torrens System, as can be seen from the above quotation.

There are some practical human problems which enter into the picture and must be dealt with. For instance, in some of the Registrars' offices in various counties throughout California, poor records are kept and there is a lack of proper supervision.(13) It is necessary to have a competent, well-trained staff to carry out the provisions of the Registration System. This can only be achieved by emphasis on adequate personnel in the various Registrars' offices.(14) If the Torrens System is ever to function properly, a thorough investigation of how records are kept should be made and a revision accomplished where necessary. This is especially applicable to the smaller counties since the large counties, such as Los Angeles, are well-staffed and operate in an efficient manner.

These then are the principal defects in the California Registration System and are the matters which must be remedied in order to have a workable Torrens System in California. It is feasible for a Torrens System to be successful, as has been the experience of certain small communities. It must, however, have the support of the people. This is perhaps the greatest problem of all, since the people of the State of California have heretofore failed to have sufficient interest in the operation of the Torrens System to support it wholeheartedly. As long as the apathy of the general public continues, it is doubtful whether a Torrens System which would operate successfuly could ever be devised. It is, therefore, up to the people of the State of California, in the last analysis, to determine whether they want a Torrens System or not.

PART II: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE RECORDING SYSTEM

Many of the defects in the California Recording System arise out of the mechanical difficulties of obtaining information from the public records. One of the main purposes of a recording system is to provide a method in which a purchaser may obtain information as to the status of title to a particular piece of property. This he should be able to find with a minimum of time and effort. Instead, due to the bulk of material and the poor indexing system in use in California, it is extremely difficult to obtain a clear picture of the record title to a particular piece of property from the official records. Under the California system as it prevails today, a purchaser must first trace through a series of Grantor-Grantee Indexes and must ultimately read every document executed

by a grantor in the chain of title to determine whether it involves the property he is interested in purchasing. This is due to the fact that the Indexes do not contain any legal description of the property conveyed. By looking at the index all a purchaser can discover is that X conveyed by deed to Y. He cannot determine from that index whether it was lot 1, lot 2, etc. which was conveyed. It is no wonder that the Boston report registers disbelief at such a deplorable condition.

The first recommendation, therefore, is that at least a provision be made requiring the index books to indicate the legal description of the property conveyed, as well as the name of the grantor and grantee and the title of the instrument, by which it was conveyed. This would help the purchaser considerably, since he could then determine, without consulting the instrument itself, whether a specific document or transaction dealt with the property he is interested in purchasing.

This would eliminate a certain amount of wasted effort. However, the bulk of title searching would still involve the tedious method of checking Grantor-Grantee Indexes back to the source of the title.(15) It would be a considerable time saver if tract indexes could be used. All transactions involving a specific parcel of property would be listed on a page containing the legal description of the property in question.(16) A purchaser, interested in a specific piece of property, could then consult the page corresponding to the legal description of the property he is interested in. He would find on this page a notation concerning all transactions connected with that piece of property. With this form of index he could obtain a picture of the chain of title at one glance rather than by having to trace the title laboriously through grantor-grantee books. From the reference contained in the tract index he could then consult the record of the particular documents which are of special interest to him.(17) This system has been used successfully by other states and by the title companies. It is true that such a change is a great undertaking and would, it has been suggested require the preparation by the state of abstract books similar to those in use by the title companies.(18) It would, however, greatly increase the productivity of the recording system and result in a far more workable system than that which is in effect at the present time.

Such a change would eliminate the defect presented in the following type of case:

A, owner of lots #1 and #2 conveys lot #1 to B by deed containing restrictive covenants which are mutually enforceable by A and B and which are applicable both to lot #1 and lot #2. Later, A sells lot #2 to C, who has no actual notice of the restrictions imposed on lot #2 by the former deed to B. The California court has held that C, the subsequent purchaser, is put on notice of the restrictions against lot #2 which he has purchased, from the record of the deed from A to B creating these mutually restrictive covenants.(19) As was pointed out in Chapter 9 of Part III, C would not be able to find the nature of these restrictions from the official records, unless he scrutinized deeds given by A

involving land which was near C's lot. This is a burden on a subsequent purchaser which could be easily eliminated by the use of a tract system. If such a system were used, a notation would be posted on the sheet set up for lot #1, showing the restrictions against lot #2 in favor of lot #1. The subsequent purchaser, C, in searching the tract index would then become completely aware of the existence of these restrictions against the property he is interested in purchasing. He would then be in a position to investigate the effect of these restrictions against him, as a subsequent purchaser of this property. This is clearly a situation in which use of a tract index, rather than a grantor-grantee index would be highly desirable and beneficial.

The fact that records are kept in various offices creates a further defect. It requires a lengthy search through various offices, such as the County Clerk's office, County Tax Collector's office, Bureau of Assessment, Probate Court records, and Bankruptcy records, with the possibility that an interested purchaser might overlook some important source of information. It would be advisable to centralize the records by requiring them to be recorded in the same office. This would perhaps, be an added burden, but would make the process of title searching much simpler. This suggestion is likewise made by the Boston report.

The bulk of the material in the recorder's office presents a mechanical problem. The use of photography has helped to a certain extent to cut down on the bulk. This is noted with approval in the Boston report. This problem of voluminous records could be further solved to a certain extent by the use of the microfilming process. When documents are microfilmed the records would take up very little space. However, the problem of flashing them on a screen everytime someone wishes to see a particular document may make such an innovation an impractical one.

The matters discussed so far in this report have been concerned with defects existing in the recording system itself—internal defects. There are, as has been pointed out in the first report and in the introduction to this second report, many defects which arise outside of the record itself. These have been referred to as external defects.

These defects present themselves whenever a purchaser of real property is held to be subject to interests in that property which do not appear in the record chain of title. For example, a purchaser may be subject to an adverse possessor's rights although the record as such shows no record of such adverse possessor's interests. The same situation arises when a forgery occurs or when certain types of fraud are involved in transactions in the chain of title. As a result of these matters a purchaser may find that he is subject to a title in the true owner and he is left with little or no recovery. These situations present difficult problems and cannot be solved easily. Some suggestions have been given by the Boston report and some further suggestions are discussed below. The changes required to eradicate these defects involve generally a radical change in the prevailing law. Even such changes as are outlined below would leave some hardship on certain parties involved as will be

pointed out in the following discussion.

The first serious off the record defect involves the rights of an adverse possessor against the rights of a bona fide purchaser of a particular piece of property. The law as it stands today holds that a purchaser of real property is put on notice from possession and therefore takes subject to interests of anyone adversely possessing the land he has purchased.(20)

The trouble which arises out of adverse possession is a serious one, since it causes a purchaser to take title subject to interests which do not appear on the record. This rule is applied even if the purchaser uses due diligence in investigating the premises to determine whether another person is in possession.

Various suggestions for remedying this defect have been suggested or attempted. One suggestion has been that an adverse possessor be required to record his claim to the property. This would make public the fact of his adverse possession. A purchaser would then be put on notice from the record.(21) If no claim is filed, the purchaser should be protected if he uses due diligence in investigating the premises. If he finds no one in possession (i.e. if the house is boarded up and there are no signs of life) the purchaser should be protected against the rights of an adverse possessor who is, perhaps, on a vacation. A rule such as this would help to remedy the dangers resulting from the doctrine of adverse possession.

The Torrens System attempted to face this problem and solve it by eliminating the right to obtain property by adverse possession.(22) In order to evaluate the desirability of dispensing with the doctrine of adverse possession entirely it is necessary to consider the basis on which adverse possession is predicated. The main purpose of such a doctrine is to cure old, defective titles. It is a method of clearing land of clouds and interests which have not been asserted for several years.(23) To this extent it is similar to a quiet title action. It is a very ancient and natural method of disposing of problems involving a parcel of real property. If an adverse possessor meets the statutory requirements, such as possession for the statutory period which is open, notorious and adverse plus payment of requisite taxes, such individual acquires an original title. He is not subject to any prior claims to that property. The rights of all persons have been cut off — the slate has been wiped clean. There is a strong public policy in favor of clearing the title to land in this manner. It is a necessary doctrine for this purpose.

Without some such doctrine, titles would not be cleared in this simple manner. Court actions involving time, expense and practical difficulties would be necessary to determine the status of old claims. It is desirable, therefore, to provide some method of clearing titles without the necessity of a court action, if the doctrine of adverse possession is to be dispensed with as it is under the Torrens System. A satisfactory method by which this could be accomplished would be by limiting the extent of title searching

that is required to prove good title - i. e. a statute limiting title searching to a 40 year period. For example, O is record owner of Blackacre. To prove a sufficient title he need only search the record back for 40 years. In searching for this period O finds that A, his vendor, acquired the title from B, by recorded deed 20 years ago; that B in turn acquired the title from C by recorded deed 20 years before the conveyance to A. This would then show clear record title in O, deraigned for 40 years. This would be the only search required. O could then convey a title free and clear from claims by persons who had interests that did not appear on the record during that 40 year period. For example, if X had acquired an interest in Blackacre, such as an easement, which appeared on the record prior to the 40 year period but not during the 40 year period, it could not be asserted by X against O or his vendee. Such a statute would, therefore, have the same effect as the doctrine of adverse possession, i. e., it would clear up old title defects.

Of course, if X were actually using his easement, this would prevent O or his vendee from becoming a bona fide purchaser since he would have actual notice from X's possession. In that case, X could assert his interest in spite of the 40 year statute referred to above.

Other external defects include fraud, forgery, lack of capacity, etc.(24) To protect purchasers against loss due to these various items a radical change in the law would be necessary. The doctrine of bona fide purchaser would have to be extended to protect a purchaser against any defect in the chain of title of which he was not aware. For example, he would have to be protected if a transfer in his chain of title was obtained by means of a forgery, or fraud (either in the factum or by means of inducement). He would have to be protected even if a transfer had been made by a person with a lack of capacity, or even where there had been a non-delivery of a deed. It is true that this would violate the common law rule that no innocent party loses his property due to a forgery. The Torrens system purported to protect the purchaser in situations like this by making the certificate of title a conclusive determination of title. The recording system could be made to operate in such a manner merely by revising the law in the various situations in which a bona fide purchaser is not protected and giving him the needed protection. As discussed in the former report, the doctrine of a bona fide purchaser does protect in several instances, but it would have to be extended considerably to protect the purchaser in all instances. It is apparent that these off the record defects do not present a very serious problem in Boston, judging from the Boston report. Under the Massachusetts law a bona fide purchaser is protected against many of the claims which the California law fails to protect a purchaser against. Even in the cases in which a purchaser is not protected against certain of these claims in Boston, it is indicated by the Boston report that the consequences have not been serious. The chances of loss from the existence of off the record defects have no doubt been exaggerated even in California. Nevertheless, the problem, although small, exists and was part of the undercurrent leading to the adoption of the Torrens System in California.

A possible solution to the loss due to the off the record defenses has been suggested by the maintenance of a state insurance fund.(25) Such fund would compensate innocent purchasers who are forced to part with land which they have purchased, due to some defect not appearing in the record and of which they had no notice. As can be seen from the articles in the footnote, such suggestion has resulted in many controversial opinions. Such a fund would have to have the backing of the State of California.

There are some minor reforms that could be suggested to avoid certain of the off the record risks.

The first is the continued photographing of documents. This helps to avoid forgeries, since the signature on record can be compared. Photography is of assistance in avoiding copying errors, also, as is pointed out by the Boston report.

The second is a more strict regulation of notaries who certify documents which are recorded. Many forgeries could be avoided by a stronger enforcement of the requirement that the notary have knowledge of the party signing the document.

In order to improve the California Recording and Registration Systems it is necessary to have a thorough revision of both systems with attention directed to some of the above matters.

FOOTNOTES to CHAPTER 4:: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE RECORDING AND REGISTRATION SYSTEMS

1. Rood, J. R., Registration of Land Title, 12 Michigan Law Rev. 379.

2. Powell, R. R., Registration of Title to Land in the State of New York (1938) says that a compulsory system is not justified. Bordwell, in his articles in 7 Univ. of Chi. L. R. 470 and 12 Iowa L. R. 63, states that such a system must be compulsory. See also: McDougall, 8 U. of Chi. L. R. 63, Fairchild and Springer, 24 Cornell L. Q. 557, for discussion of this problem.

3. Land Title Law, Section 105.

4. Land Title Law, Sections 37 and 38.

5. See report prepared by J. Dougherty for State Lands Commission of California regarding the various counties of California and particularly the report on San Bernardino County. See also Chaplin, 6 Harvard L. R. 302, where a tax is recommended to build up an insurance fund.

6. Powell, R. R., Registration of Title, cited supra, footnote #2 recommends publicly regulated but privately controlled title insurance. See also Bordwell's article in 7 Univ. of Chi. L. R. 470, cited supra, footnote #2.

7. Follette v. Pacific L. & P. Corp., 189 Cal. 193; Swartzbaugh v. Sargent, 30 Cal. App. (2) 467; Moakley v. L. A. Pacific Ry. Co., 99 Cal. App. 74.

8. 30 Cal. App. (2) 467.

9. Pennoyer v. Neff, 95 U. S. 714; Arndt v. Griggs, 134 U. S. 316; Freeman v. Alderson, 119 U. S. 185; Wilson v. Seligman, 144 U. S. 41; First National Bank v. Eastman, 144 Cal. 487; Loaiza v. Superior Court, 85 Cal 11.

10. Overby v. Gordon, 117 U. S. 214; Lynch v. Murphy, 161 U. S. 247; Reynolds v. Stockton, 140 U. S. 254.

11. See Chaplin, H. W., 6 Harvard L. R. 302, cited supra footnote #5, discussing necessity for a conclusive determination of title to land; Corret, J. R., Land Transfer - A Reply to Criticisms, 7 Harvard L. R. 24, stating that an owner is entitled to exclusive possession of land and the State should see to it he gets it. The Boston report emphasizes that the decree must be conclusive even as against the State of California. See Newcomb v. Newport Beach, 7 Cal. (2) 393.

12. Bordwell, 7 Univ. of Chi. L. R. 470, cited supra footnote #2.

13. See report by J. Dougherty referred to in footnote #5.

14. Powell in his book cited in footnote #2 discusses the difficult personnel problems connected with the Torrens System.

15. See Chapter 1 of Part III for example of search method involved in grantor-grantee system. See Home, W. S., Escrow and Land-Title Procedure (1948).

16. See Home, W. S., Escrow and Land Title Procedure, Ibid, for a description of the tract indexes used by title companies.

17. Bordwell, P., 7 Univ. of Chi. L. R. 470, cited supra, footnote #2. This article emphasizes inadequate indexing of official recording systems. Concludes that an adequate indexing system together with a comprehensive action to quiet title should solve the problem of the difficulties encountered in recording systems in the United States. See also on this subject, McCormick, C. T., Possible Improvements in the Recording Acts, 31 W. Va. L. Q. 79.

18. Bordwell, P., 7 Univ. of Chi. L. R. 470, Ibid.

19. Miles v. Clark, 44 Cal. App. 539.

20. Civil Code Sec. 1007; West v. Evans, 29 Cal. (2) 414.

21. 14 California Law Review 287.

22. Land Title Law, Sec. 35.

23. See the following articles for discussion of adverse possession and its purpose. McCormick, C. T., 31 W. Va. L. Q. 79, cited supra, footnote #17; Haymond, 2 S.C.L.R. 139; Rood, 12 Mich. L. R. 379.

24. Chaplin, H. W., 6 Harvard L. R. 302, cited supra, footnote #5.

25. Chaplin, H. W., 6 Harvard L. R. 302, Ibid, advocates a tax for such an insurance fund; Powell, R. R., Registration of Title, cited supra footnote #2, advocates state regulation of title insurance companies rather than a state insurance fund; Bordwell, P. 7 Univ. of Chi. L. R. 470, cited supra footnote #2, appears to be in accord with Powell's suggestions; McDougall, 46 Yale L. R. 1125, criticizes this suggestion made by Powell.